JD(ATL)–34–14
Tampa, FL

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

**CITIGROUP TECHNOLOGY, INC.
AND CITICORP BANKING
CORPORATION (PARENT),
A SUBSIDIARY OF CITIGROUP, INC.**

and **CASE 12-CA-130742**

ANDREA SMITH, An Individual

Thomas W. Brudney, Esq.,
for the General Counsel.
Edward M. Cherof, Esq., Jonathan J. Spitz, Esq., Stephanie Adler-Paindiris, Esq. (Jackson Lewis, LLP), **of Orlando, Florida,** **&** ***Andrew Frisch, Esq. (Morgan & Morgan),***
for the Respondent.

DECISION

STATEMENT OF THE CASE

DONNA N. DAWSON, Administrative Law Judge. This case involves issues related to *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014), and *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012), enf. granted in part and denied in part 737 F.3d 344 (5th Cir. 2013). On June 12, 2014, Andrea Smith ("Charging Party" or "Smith") filed an initial charge, and on August 27, 2014, she filed a first amended charge. A complaint issued on August 29, 2014, and an amended complaint issued on September 10, 2014 ("the complaint"). The complaint alleges that Citigroup Technology, Inc. and Citicorp Banking Corporation (parent), a subsidiary of Citigroup, Inc. ("Respondent") violated Section 8 (a)(1) of the National Labor Relations Act (the "NLRA" or the "Act") by maintaining and enforcing a mandatory employment arbitration policy precluding its employees from pursuing any group, class, or collective actions, arbitration or otherwise, concerning wages, hours, and other terms and conditions of employment. Although Respondent admits in its amended answer that it maintained and enforced its arbitration policy, it denies that any of its actions violated the Act and sets forth several affirmative defenses.

On October 8, 2014, the parties jointly requested that the case be decided without a hearing based on a stipulated record, with attachments. The motion was granted on October 9, 2014, and the parties subsequently filed their briefs.

Having considered the entire stipulated record and the briefs, for the reasons set forth below, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, Respondent, a Delaware corporation with an office and place of business in Tampa, Florida (Respondent's Tampa facility), has been engaged in the business of providing global financial services. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Since about December 26, 2012, Respondent has "maintained and enforced" as part of its U.S. Employee Handbook, "Appendix A: The Employment Arbitration Policy" revised ("EAP") which is applicable to all of its employees in the United States, including those employed at its Tampa facility. This arbitration policy includes the following relevant provision:

> The Policy makes arbitration the required and exclusive forum for the resolution of all disputes arising out of or in any way related to employment based on legally protected rights (i.e., statutory, regulatory, contractual, or common-law rights) that may arise between an employee or former employee and Citi or its current and former parents, subsidiaries, and affiliates and its and their current and former officers, directors, employees, and agents (and that aren't resolved by the internal Dispute Resolution Procedure) including, without limitation, claims, demands, or actions under Title VII of the Civil Rights Act of 1964, the Civil Rights Acts of 1866 and 1991, the Age Discrimination in Employment Act of 1967, the Older Workers Benefit Protection Act of 1990, the Rehabilitation Act of 1973, the Americans with Disabilities Act of 1990, the Family and Medical Leave Act of 1993, the Fair Labor Standards Act of 1938, the Equal Pay Act of 1963, the Employee Retirement Income Security Act of 1974, the Worker Adjustment and Retraining Notification Act, the Sarbanes-Oxley Act of 2002, and the amendments thereto, and any other federal, state, or local statute, regulation, or common-law doctrine regarding employment, employment discrimination, the terms and conditions of employment, termination of employment, compensation, breach of contract, defamation, retaliation, whistle-blowing, or any claims arising under the Citigroup Separation Pay Plan.
>
> Except as otherwise required by applicable law, this Policy applies only to claims brought on an individual basis. Consequently[,] neither Citi nor any employee

may submit a class action, collective action, or other representation action for resolution under this Policy.

(Jt. Exh. 4).

Since about December 26, 2012, and at all material times thereafter, Respondent has required its newly hired employees to agree to and accept its EAP as a condition of employment. Based on this agreement, Respondent has precluded these employees from filing any "group, class, collective, or other representative action claims in arbitration," or otherwise, in connection with disputes identified in the EAP concerning wages, hours, and other terms and condition of employment. Of note, Respondent's EAP also states that it does not "exclude the National Labor Relations Board from jurisdiction over disputes covered by the [Act]…" (Id.).

In January 2013, Respondent hired Darlene Echevarria (Echevarria) as an anti-money laundering operations analyst in its Tampa facility. Echevarria worked in this position from January 7 until August 23, 2013.

Similarly, Respondent hired Charging Party Smith. By letter dated January 31, 2013, Respondent offered Smith the position of anti-money laundering operations analyst in its Tampa facility. The job offer letter includes an arbitration provision which reads in relevant part:

> **Arbitration:**
> Any controversy or dispute relating to your employment with or separation from Citi will be resolved in accordance with Citi's Employment Arbitration Policy as set forth in the Principles of Employment which you will be required to sign as a condition of your Citi employment, the terms of which are incorporated herein. A copy of the Principles of Employment is attached.
>
> I acknowledge that I have received and read or have had the opportunity to read this arbitration agreement. I understand that this arbitration agreement requires that disputes that involve the matters subject to the agreement be submitted to mediation or arbitration pursuant to the arbitration agreement rather than to a judge and jury in court.

(Jt. Exh. 2, p. 4). The referenced "Principles of Employment," state in relevant part:

> [Y]ou agree to follow our dispute resolution/arbitration procedure for resolving all disputes (other than disputes which by statute are not arbitrable) arising out of or relating to your employment with and separation from Citi.* This applies while you are employed by us as well as after your employment ends. While we hope that disputes with our employees will never arise, we want them resolved promptly if they do arise. These procedures do not preclude us from taking disciplinary actions (including terminations) at any time, but if you dispute those actions, we both agree that the disagreement will be resolved through these procedures. Our procedures are divided into two parts:

1. An internal dispute resolution procedure that allows you to seek review of any action taken regarding your employment or termination of your employment which you think is unfair.

2. In the unusual situation when this procedure does not fully resolve a dispute, and such dispute is based upon a legally protected right (i.e., statutory, contractual, or common law), we both agree to submit the dispute, within the time provided by the applicable statute(s) of limitations, to binding arbitration as follows:

. . . .

- Before the American Arbitration Association ("AAA") where you don't meet the criteria above for FINRA [Financial Industry Regulatory Authority, Inc.] arbitration, FINRA declines the use of its facilities, or you are a Dual Employee and your dispute does not involve CGMI [Citigroup Global Markets Inc.] or activities related to your securities license(s).

Arbitrations shall be conducted in accordance with the respective arbitration rules of the FINRA or AAA, as applicable, then in effect and as supplemented by Citi's Arbitration Policy then in effect ("Arbitration Policy"). A detailed description of the Arbitration Policy is included in the Employee Handbook, and is available for review prior to your acceptance of employment if you choose to review it. Again, it is your responsibility to read and understand the dispute resolution/arbitration procedure.

(Jt. Exh. 2, pp. 7-8).

On February 5, 2013, Smith accepted and signed the January 31, 2013 job offer as a condition of her employment. She also electronically signed the receipt for Respondent’s U.S. 2013 Employee Handbook and EAP. (Jt. Exhs. 2–3). Smith worked for Respondent as an anti-money laundering operations analyst from about February 19, 2013, until March 28, 2014, when she voluntarily resigned.

On March 28, 2014, Echevarria, on her own behalf, and also on the behalf of other similarly situated employees of Respondent, including Smith and Danielle Lucas (Lucas), Yadira Calderon (Calderon), and Kelleigh S. Weeks (Weeks), through counsel, filed a demand for arbitration with the American Arbitration Association (the AAA), titled “Nationwide Class Action Arbitration Submission,” (class arbitration action), along with a “Notice of Filing Notice of Consent to Join,” and notices of “Consent to Join” collective action.[1] They sought designation of the action as a collective action and alleged that Respondent violated the Fair Labor Standards Act (FLSA), 29 U.S.C. Sec. 201 et. seq., by failing to pay overtime premium pay. (Jt. Exh. 5).

[1] Darlene Echevarria, on her own behalf and others similarly situated v. Citigroup, Inc., a Foreign Corporation and Citibank, N.A., Case No. 01–14–0000–0324.

On April 14, 2014, the AAA case filing coordinator, Kristen Cottone (Cottone) sent a letter to the representatives of the parties to the class arbitration action, requesting a copy of the complete arbitration agreement so that the AAA could determine whether to proceed with the class action. The letter stated that, "[t]he Association requests that either Claimant or Respondent provide a contract clause providing for administration by the [AAA]." Cottone also requested any additional documents that "discuss arbitration procedures to be followed, such as an employee handbook," as well a court order or joint stipulation, if any, compelling the dispute to arbitration. (Jt. Exh. 6).

On April 15, 2014, counsel for Respondent sent a letter to the AAA, along with a copy of the EAP, and requested that the AAA reject Echevarria's demand for designation of the claim as a nationwide collective arbitration action, and instead, only accept her individual claim. (Jt. Exh. 7). On April 28, 2014, Cottone, on behalf of the AAA, notified the parties that the AAA had received a copy of the EAP, and that, "[i]n accordance with the AAA's policy on class arbitrations, we cannot administer this matter as a class action since the agreement between the parties prohibits class claims." She further advised the parties that they "may proceed with this matter on an individual basis." (Jt. Exh. 8). Thus, as admitted by Respondent, it successfully enforced its EAP.

III. Decision and Analysis

A. Respondent's Maintenance and Enforcement of Its EAP Violates Section 8(a)(1) of the Act

The complaint asserts violations of Section 8(a)(1) of the Act. Under Section 8(a)(1), it is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act. The rights guaranteed in Section 7 include the right "to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . ."

In *D.R. Horton,* 357 NLRB No. 184, slip op. at 1, the Board found that an employer violates Section 8(a)(1) of the Act by imposing, as a condition of employment, a mandatory arbitration agreement that precludes employees from "filing joint, class, or collective claims addressing their wages, hours, or other working conditions against the employer in any forum, arbitral or judicial." Citing to *Spandsco Oil & Royalty Co*., 42 NLRB 942, 948–949 (1942), *Salt River Valley Water Users Assn.*, 99 NLRB 849, 853–854 (1952), enfd. 206 F.2d 325 (9th Cir. 1953), and many other cases, the Board noted that such concerted legal action addressing wages, hours, and working conditions has consistently fallen within Section 7's protections. Most recently, in *Murphy Oil USA, Inc.*, 361 NLRB No. 72, slip op. at 1–2, the Board adopted and reaffirmed the rationale and decision in *D.R. Horton*. The *Murphy Oil* Board found that the respondent violated Section 8(a)(1) of the Act by requiring its employees to agree to mandatory arbitration agreements requiring them to resolve all employment-related disputes through individual arbitration, and by taking steps to enforce the unlawful agreements in Federal district court when the charging party and three other employees filed a collective action under the FLSA. Id.

The complaint here specifically alleges that Respondent violated the Act by maintaining and enforcing the EAP as a condition of its employees' employment, including that of the Charging Party (Smith), by precluding them from filing any group, class, collective, or other representative action claims, through arbitration or the judicial system, of disputes identified in the EAP concerning wages, hours, and other terms and conditions of employment.

First, it is undisputed that Respondent's EAP has been maintained as a condition of the newly hired employees' employment from December 26, 2012, and continuing to the present, as evidenced by the stipulated record. This includes, of course, Smith's employment. Further, Smith electronically signed the EAP on February 5, 2013, when she accepted Respondent's employment offer and acknowledged receipt of the principles of employment and the U.S. 2013 Employee Handbook receipt form. (Jt. Exh. 4). Therefore, I find the EAP was a mandatory rule imposed by Respondent as a condition of employment. As such, the EAP is evaluated in the same manner as any other workplace rule. See *D.R. Horton*, 357 NLRB No. 184, slip op. at 5.

To determine if such a rule, including a mandatory arbitration policy, violates Section 8(a)(1) of the Act, the Board applies the test set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). See *U-Haul Co. of California*, 347 NLRB 375, 377 (2006), enfd. 255 Fed.Appx. 527 (D.C. Cir. 2007); *D.R. Horton*, supra, 357 NLRB No. 184. Under *Lutheran Heritage*, the first inquiry is whether the rule explicitly restricts activities protected by Section 7. If it does, the rule is unlawful. If it does not, "the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to [Section 7] activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." *Lutheran Heritage,* supra at 647. In the instant case, I find that the EAP explicitly restricts activities protected by Section 7, in that it states:

> Except as otherwise required by applicable law, this Policy applies only to claims brought on an individual basis. Consequently neither Citi nor any employee may submit a class action, collective action, or other representation action for resolution under this Policy.

Further, Respondent admitted, in its answer, to paragraph 4(c) of the complaint that by maintenance of its EAP, it "has precluded employees from filing any group, class, collective, or other representative action claims in arbitration with respect to disputes identified in the [EAP] which concern wages, hours and other terms and conditions of employment." In addition, Respondent admitted, to paragraph 5(b) of the complaint, that since on or about April 15, 2014, it made efforts to enforce its EAP when it requested that the AAA reject the nation-wide class action submission filed by Echevarria, on her own behalf, and on behalf of other of Respondent's similarly situated employees, including Smith. (Jt. Exh. 5). Accordingly, I find that Respondent's maintenance of its EAP and efforts to enforce it violate the Act because the EAP expressly precludes any class or collective actions. In doing so, I find that Respondent restricted the exercise of employees' Section 7 rights in violation of Section 8(a)(1) of the Act. This finding is fully supported by the Board's decisions in *D.R. Horton* and *Murphy Oil*.

B. D.R. Horton and Murphy Oil Are Controlling

Respondent insists that this matter is not one to be "decided in a vacuum of [NLRB] precedent," but "a proceeding that brings into question the jurisdiction of the Board to act in a matter Congress has chosen to regulate through…the [FAA]…," and not the NLRA or Board law. In support of this argument, Respondent presents a litany of recent United States Supreme Court decisions which "have established the broad preemptive sweep of the FAA," by mandating "that arbitration agreements must be enforced according to their terms." Respondent contends that these decisions "reject the application of other state and federal statutes" in order to deem arbitration agreements invalid in the absence of an express 'congressional command' to override the FAA. See (R. Br. citing and discussing, e.g., *American Express Co. v. Italian Colors Restaurant*, 133 S.Ct. 2304 (2013); *CompuCredit*, 132 S.Ct. 665, 669 (2012); and *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627 (1985)). In the same vein, Respondent argues that the NLRA has not vested the Board with authority to dictate or guarantee how other courts or agencies would or should adjudicate non-NLRA legal claims, whether they be class, collective, joinder of individual claims, or otherwise, citing Board Member Miscimarra's dissent in *Murphy Oil*. Respondent also asserts that the Board's holding in *D.R. Horton* is incorrect based on its rejection by the U.S. Court of Appeals for the Fifth Circuit in its opinion on appeal of *D.R. Horton* (737 F.3d 344 (Dec. 3, 2013)), and based on other federal court opinions. In sum, Respondent urges that I ignore the Board's decisions in *D.R. Horton* and *Murphy Oil*, and instead, follow its interpretation of Supreme Court precedent, Federal court opinions, and Board member dissent.

However, I decline to deviate from Board precedent. The Board majority, in both *D.R. Horton* and *Murphy Oil*, considered all arguments, and most court decisions, raised and relied on by Respondent, to support a different conclusion, by which I am bound unless and until it is reversed by the Supreme Court. See *Pathmark Stores*, 342 NLRB 378 fn. 1 (2004); *Waco, Inc.*, 273 NLRB 746, 749 fn. 14 (1984) ("it is a judge's duty to apply established Board precedent which the Supreme Court has not reversed," and "for the Board, not the judge, to determine whether precedent should be varied.") (citation omitted).[2]

In *American Express Co.*, supra, the Supreme Court dismissed claims by multiple merchants that their agreements to arbitrate individual claims as the sole method of resolving disputes was invalid, and concluded that when federal statutory claims are involved, such as federal antitrust laws, the FAA's directive can only be "overridden by a contrary congressional command."[3] However, the Board in *D.R. Horton* distinguished *American Express*, finding that it did not involve the substantive Section 7 right of employees to engage in collective action, including collective legal action, for mutual aid and protection concerning wages, hours, and work conditions.

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[2] Respondent's argument, in its brief, that the Board's non-acquiescence position is untenable because of Federal Circuit Court opinions rejecting *D.R. Horton* is without merit. See (R. Br. fn. 4).

[3] The merchants in *American Express* challenged the rates that American Express charged them, and argued that it would only be cost effective to proceed collectively. The Court found that the Federal antitrust laws at issue failed to guarantee "an affordable procedural path to the vindication of every claim." *American Express*, supra at 2039.

Although the Supreme Court has upheld the enforcement of individual mutual arbitration agreements in these and other cases, the Board recognizes that the Court has never addressed or resolved the issue of exclusive individual arbitration over class and/or collective actions under the Act. The Board understands that the FAA establishes a liberal policy favoring arbitration agreements. *D.R. Horton*, 357 NLRB No. 184, slip op. at 8. However, as noted in *D.R. Horton*, the Supreme Court has "repeatedly emphasized" that the FAA protects agreements to arbitrate federal statutory claims "so long as 'a party does not forgo the substantive rights afforded by the statute.'" Id. at 9–10, citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (quoting *Mitsubishi Motors Corp.*, supra at 628.[4]

Respondent further contends that the Supreme Court in *American Express* makes clear that it is improper to find a congressional command where none exists, and therefore, since none exists in the language or legislative history of the NLRA, there should be no such finding here. However, as stated, the Board decisions in *D.R. Horton* and *Murphy Oil* establish that such a command exists in that Section 7 substantively guarantees employees the right to engage in collective action, including collective legal action, for mutual aid and protection concerning wages, hours, and working conditions. For the same reasons, the Supreme Court's decision in *CompuCredit*, supra, and other cases cited by Respondent are distinguishable.[5] Further, these general consumer litigation and commercial cases do not address the central questions of how and to what extent the FAA may be used to interfere with, by way of private agreements, the fundamental substantive right of workers to engage in concerted activity established and protected by the NLRA—the gravamen of the violation here and in *D.R. Horton*.

Respondent also points to *AT&T Mobility v. Concepcion*, 131 S.Ct. 1740 (2011),[6] *Marmet Health Care Center v. Brown*, 133 S.Ct. 1201 (2012) (requirement that courts enforce the parties' bargain to arbitrate), and other Supreme Court cases to support its argument that the validity of their EAP and class action waiver contained therein must be based only on the FAA. Similarly, the Supreme Court in these cases did not address the issue of mandatory arbitration agreements in the context of individual employment agreements and the well-established substantive right of employees under the NLRA to engage in concerted legal action against their employer. The *Murphy Oil* Board has reaffirmed, and thoroughly and convincingly explained its rationale as to why *D.R. Horton* was correctly decided, despite the FAA's liberal arbitration policy. Thus, Respondent's argument that the FAA must always override the NLRA in these mandatory arbitration agreement cases fails.

The Board in *Murphy Oil* noted the Supreme Court's recent confirmation "that the Federal policy favoring arbitration, however, liberal, has its limits. It does not permit a 'prospective waiver of a party's right to pursue statutory remedies.'" *Murphy Oil*, 361 NLRB

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[4] The Board distinguished *Gilmer*, in that it "addresses neither Section 7 nor the validity of a class action waiver," and involved an individual claim and an arbitration agreement without any language specifically waiving class or collective actions. *D.R. Horton*, 357 NLRB No. 184, slip op. at 10, fn. 22.

[5] The Supreme Court in *CompuCredit* invalidated an arbitration agreement waiving the ability of consumers to sue a credit card marketer and the card's issuing bank in court for alleged violations of the Credit Repair Organization Act (CROA).

[6] In *AT&T Mobility LLC v. Concepcion*, the Supreme Court found the FAA preempted California state law making class-action waivers in consumer adhesion contracts unconscionable.

No. 72, slip op. at 8, citing *Italian Colors*, supra, 133 S.Ct. at 2310 (quoting *Mitsubishi Motors Corp.*, supra, at 637) (emphasis in original). In doing so, the Board established that an arbitration agreement that prevents employees from exercising their substantive Section 7 right to pursue legal claims concertedly to address work conditions in any forum "amounts to a prospective waiver of a right guaranteed by the NLRA," and is unlawful. Id. at 9.

The Board in *Murhpy Oil* also found that even applying the framework applied by the Fifth Circuit Court of Appeals, *D.R. Horton* is good law. The Board established that both exceptions to the FAA's requirement that arbitration agreements must be enforced according to their terms, apply to cases such as *D.R. Horton*. First, the *Murphy Oil* Board found the arbitration agreement in its case "invalid under Section 2 of the FAA, the statute's savings clause, which provides for the revocation 'upon such grounds as exist at law or in equity for the revocation of any contract.'" *Murphy Oil*, 361 NLRB No. 72, slip op. at 9, citing 9 U.S.C. § 2. The Board found that such grounds existed in its case, and relied on earlier Supreme Court decisions to establish that, "*any* individual employment contract that purports to extinguish rights guaranteed by Section 7 of the National Labor Relations Act is unlawful." Id. at 9, citing *National Licorice, Co. v. NLRB*, 309 U.S. 350, 361 (1940) and *J.I. Case, Co. v. NLRB*, 321 U.S. 332, 337 (1944).

Second, the Board agreed with the *D.R. Horton* Board's opinion regarding the second exception of the FAA's mandate, that Section 7 of the Act does constitute a "contrary congressional command" overriding the FAA. It saw "no compelling basis for the court's conclusion that to override the FAA, Section 7 was required to explicitly provide for a private cause of action for employees, a right to file a collective legal action, and the procedures to be employed." Further, the Board emphasized the substantive right to engage in collective legal activity "plainly authorized by the broad language of Section 7, as it has been authoritatively construed by the Supreme Court in [*Eastex, Inc*. v. NLRB, 437 U.S. 556, 566 (1978)] as part of the protected 'resort to administrative and judicial forums.'" *Murphy Oil*, 361 NLRB No. 72, slip op. at 9. All other cases cited by Respondent in support of its positions favoring the FAA over the NLRA and discrediting Board precedent are not specifically addressed here as they are so thoroughly explained in *D.R. Horton* and *Murphy Oil*.

C. *Respondent's Remaining Arguments Are Unsupported*

Respondent's assertion that unrepresented employees are on an equal playing field with unions that, on behalf of its members, can voluntarily agree to waive a judicial forum in favor of arbitration is without merit. The Act clearly recognizes the inequality of bargaining power between employees without benefit of a collective-bargaining agreement or union representation and employers who are corporately or otherwise organized. See 29 U.S. C. § 151. Therefore, a mandatory arbitration agreement, such as Respondent's EAP, which embodies a waiver restricting employees' substantive rights under the Act, "is the antithesis of an arbitration agreement providing for union representation in arbitration that was reached through the statutory process of collective bargaining…" *Murphy Oil*, 361 NLRB No. 72, slip op. at 10. Although the *D.R. Horton* and *Murphy Oil* Boards recognize the importance of such balancing of power under the Act, neither claims the inequality in bargaining power between individual employees and employers is the only reason to invalidate mandatory arbitration agreements.

Respondent argues that its EAP is distinguishable from the agreement that the Board found unlawful in *D.R. Horton* because it specifically states that it does not "exclude the National Labor Relations Board from jurisdiction over disputes covered by the [Act]…" Similarly, Respondent claims that its EAP would not preclude the U.S. Department of Labor, or similar state agency, from seeking class-wide or collective action on behalf of the Charging Party. See (R. br., fn 2). However, there is nothing in Respondent's EAP which allows for employees, past or present, to pursue in any way, even as parties in an FLSA or DOL action, class, joint, or collective claims in arbitration or court. Moreover, Respondent's EAP "makes arbitration the required and exclusive forum for the resolution of all disputes arising out of or in any way related to employment based on legally protected rights." (Jt. Exh. 1). It does not leave open any judicial forum, as required by the Board in *D.R. Horton*, nor does it allow for collective or class arbitration. See *D.R. Horton*, 357 NLRB No. 184, slip op. at 12. Of note, the *Murphy Oil* Board rejected a similar argument where a revised arbitration agreement stated that employees would not waive their Section 7 right to file a class or collective action in court, but maintained its original language under which employees "explicitly waive their right" to file or be a party or class member in a class or collective action in arbitration or other forum. See *Murphy Oil*, 361 NLRB No. 72, slip op. at 19.

Respondent also asserts that the Board has no authority to order it to take action regarding litigation initiated by the Charging Party in another forum, and which involves another federal statute, the FLSA. The Board, in *D.R. Horton* and *Murphy Oil*, explained how the Board and court decisions recognized this authority in cases, such as this one, where mandatory arbitration agreements "restrict the exercise of the *substantive* right to act concertedly for mutual aid or protection that is central to the [NLRA]." *Murphy Oil*, 361 NLRB No. 72, slip op. at 5, citing *D.R. Horton*, 357 NLRB No. 184, slip op. at 2–3 & fn. 4. The *Murphy Oil* Board recognized that while the underlying claims before it involved the FLSA, the NLRA "is the source of the relevant, substantive right to pursue those claims concertedly." Id. at 5. Further, the Board and courts have held that the filing of FLSA cases, and seeking support of others in pursuit of those cases, constitutes the kind of concerted activity protected by the Act. See, *Murphy Oil*, Id., citing *Spandso Oil & Royalty Co.*, 42 NLRB 942, 949–950 (1942); *Salt River Valley Water Users' Assn. v. NLRB*, 206 F.2d 325 (9th Cir. 1953).

Next, Respondent contends that even if the EAP was mandatory, it did not violate the Act because the use of class action procedures is not a substantive right. Similarly, Respondent denies that Smith, Echevarria, and other similarly situated employees, engaged in concerted activities with other employees for the purpose of mutual aid and protection by filing a nationwide collective action arbitration submission before the AAA on about March 28, 2014. This contention fails on both counts. First, the Board has made clear that the Act does not create or ensure a right to "class certification or the equivalent," but a right "to *pursue* joint, class, or collective claims if and as available, without the interference of an employer-imposed restraint." *Murphy Oil*, 361 NLRB No. 72, slip op. at 2, citing *D.R. Horton*, 357 NLRB No. 184, slip op. at 10 & fn. 14.

Second, Smith and other employees joined the nationwide class action submission filed by Echevarria, as is evidenced by the "Notice of filing Notice of Consent to Join" and "Notices of Consent to Join Collective Action" signed by Echevarria, Smith, Lucas, Calderon, and Weeks. (Jt.

Exh. 5.) There is simply no evidence in this case that Smith, Eschevarria, and the other designated, similarly situated employees were acting on their own behalf. Thus, I reject Respondent's argument that concerted activity in this case is merely presumed, and not based on actual evidence as required by the Board. See *Meyers Industries, Inc. & Prill*, 268 NLRB 493 ("Meyers I") and *Meyers Industries, Inc. & Prill*, 281 NLRB 882 (1986) ("Meyers II").

Respondent also contends, in the same context, that since Smith was no longer an employee at the time she filed the underlying charge, she could not have been engaged in protected concerted activity when she submitted a demand for class-wide arbitration, or have joined a putative class action for the purpose of mutual aid or protection. Respondent relies on *Statutory Engineers, Local 39*, 346 NLRB 336, 347 fn. 9, in which the Board affirmed an administrative law judge's decision finding that Sec. 2(3) of the Act does not include in its definition of employees former employees who are filing personal lawsuits against their former employer and who have lost their jobs for reasons other than a labor dispute or because of an unfair labor practice. Accepting this argument would mean that Smith would not have standing to have filed the underlying charge, which she clearly does. Unlike this case, in *Statutory Engineers*, supra, the affected employee was found to have been terminated for good cause, and had filed a personal lawsuit. Here, Smith did not file a personal lawsuit. Moreover, the Act does not place such a limitation on who may file a charge. See Sec. 10 of the Act and *NLRB v. Indiana & Michigan Electric Co.*, 318 U.S. 9, 17 (1943). It is well established that the term "employee" under the Act includes former employees of the employer. See Section 2(3) of the Act; *Redwood Empire, Inc.*, 296 NLRB 369, 391 (1989); *Waco, Inc.*, 273 NLRB 746, 747 fn. 8 (1984).

Next, Respondent asserts this claim should be barred due to the "Voluntariness Carve-Out" in footnote 28 of *D.R. Horton*. In other words, Respondent argues that because Smith, unlike the charging party in *D.R. Horton*, signed and agreed to the terms of the EAP when she applied for employment, she was fully informed, and voluntarily agreed to individually arbitrate any employment disputes with Respondent. However, as Respondent acknowledged, the charging party in *Murphy Oil*, like Smith, did in fact sign the arbitration agreement when she applied for employment. Although the *Murphy Oil* Board did not specifically address the matter of voluntariness, it clearly establishes that it matters not when an employee signs a mandatory arbitration agreement forfeiting his or her Section 7 substantive rights.

Next, Respondent argues that this claim is untimely under Section 10(b) of the Act because Respondent's alleged actions causing Smith to be bound by its EAP occurred more than six months before she filed her charge on June 8, 2014. Respondent contends that the 6-month statute of limitations commenced in February 13, 2013, when Smith began employment with Respondent, and agreed to its EAP. However, this argument is without merit under controlling case law holding that a continuing violation exists as long as the rule is still being enforced at the time the charge is filed. See e.g., *Carney Hospital*, 350 NLRB 627, 640 (2007). Further, Respondent did not attempt to enforce its EAP until April 14, 2014, when it sent a letter to the AAA requesting that the class-action arbitration submission be rejected. See *Alamo Cement Co.*, 277 NLRB 1031, 1036–1037 (1985) (not time barred where enforcement allegation could not have been litigated sooner).

Finally, in its answer, Respondent relied on the Supreme Court decisions *Bill Johnson's v. NLRB*, 461 U.S. 731, 741 (1983), and *BE&K Construction*, 536 U.S. 516 (2002), to argue that its request for the AAA to preclude class arbitration pursuant to its EAP is constitutionally protected by the First Amendment, and should therefore be stayed pending the final outcome of Smith's FLSA claim. This argument is admittedly based on Respondent's belief that its EAP and enforcement thereof are lawful. As Respondent acknowledges, the *Murphy Oil* Board rejected this argument and reliance on *Bill Johnson's* and *BE&K* because it found the underlying arbitration agreements and enforcement of those agreements unlawful. Further, the First Amendment does not protect the right to file lawsuits or motions that have an illegal objective under the Act. See *Murphy Oil*, 361 NLRB No. 72, slip op. at 20-21; *Allied Trades Council (Duane Reade)*, 342 NLRB 1010, 1013 fn. 4 (2004), citing *Bill Johnson's*, supra at 738. I reject these First Amendment arguments, as well as Respondent's claim that its efforts did not constitute enforcement of its EAP. I find that Respondent's efforts to enforce its unlawful EAP, by petitioning the AAA to reject the nation-wide class action claim pursuant to the EAP, clearly had an illegal basis pursuant to the Board decisions in *D.R. Horton* and *Murphy Oil*.

Based on the foregoing, I find that Respondent's maintenance of its EAP and enforcement efforts through the AAA violate Section 8(a)(1) of the Act as alleged in complaint.

CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of Section 2(6) and (7) of the Act.

2. Respondent violated Section 8(a)(1) of the Act by maintaining the EAP, and by enforcing that policy by moving to compel individual arbitration of the Charging Party's class-action submission before the AAA.

3. Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

As I have concluded that the EAP is unlawful, the recommended order requires that Respondent revise or rescind it and advise its employees in writing that said rule has been so revised or rescinded. Because Respondent utilized the EAP on a corporate-wide basis, Respondent shall post a notice at all locations where the EAP, or any portion of it requiring all and/or enumerated employment-related disputes to be submitted to individual arbitration, was in effect. See, e.g., *U-Haul Co. of California*, supra, fn. 2 (2006); *D.R. Horton,* supra, slip op. at 17. Respondent is also ordered to distribute appropriate remedial notices to its employees electronically, such as by email, posting on an intranet or internet site, and/or other appropriate electronic means, if it customarily communicates with its employees by such means. *J. Picini Flooring*, 356 NLRB No. 9 (2010).

I recommend Respondent be required to reimburse Charging Party Andrea Smith and other grievants for any litigation and related expenses, with interest, to date and in the future, directly related to Respondent's filing its request/petition for the AAA to reject their demand for a nationwide collective or class arbitration in *Darlene Echevarria* et al. *v. Citigroup, Inc.,* et al. (Case No. 01–14–0000–0324). Determining the applicable rate of interest on the reimbursement will be as outlined in *New Horizons for the Retarded*, 283 NLRB 1173 (1987) (adopting the Internal Revenue Service rate for underpayment of Federal taxes). Interest on all amounts due to Ms. Smith shall be computed on a daily bases as prescribed in *Kentucky River Medical Center*, 356 NLRB 8 (2010).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended.[7]

ORDER

Respondent, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining an EAP that precludes employees from filing and/or maintaining class or collective actions in any arbitral or judicial forum.

(b) Enforcing (or attempting to enforce) the EAP to prohibit class or collective actions;

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind or revise the EAP, in all forms and places, to make it clear to employees that the policy does not require them, as a condition of their employment, to waive their right to maintain employment-related class or collective actions in all forums, whether arbitral or judicial.

(b) Notify the employees of the rescinded or revised EAP, to include providing them with a copy of any revised policies, acknowledgement forms or other related documents, or specific notification that the EAP has been rescinded.

(c) Reimburse Smith and all grievants for all reasonable expenses and legal fees, if any, incurred in opposing Respondent's request/petition to compel individual arbitration

[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

before the AAA, with interest, in *Darlene Echevarria* et al. *v. Citigroup, Inc.,* et al. (Case No. 01–14–0000–0324).

(d) Ensure that the Charging Party Andrea Smith, and all similarly situated employees, have a forum to litigate or arbitrate their class complaint by either moving the AAA, jointly with the Charging Party upon request, to vacate its decision to not administer the matter as a class action, or permitting her/their claims, upon request, to be arbitrated on a class-wide basis.

(e) Within 14 days after service by the Region, post at its facility in Tampa, Florida, and in all facilities where it has maintained and/or enforced the EAP, copies of the attached notice marked "Appendix."[8] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by Respondent's authorized representative, shall be posted by Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 26, 2012.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. December 23, 2014

Donna N. Dawson
Administrative Law Judge

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT maintain or enforce an employment arbitration policy (EAP) or agreement that requires employees, as a condition of their employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial, and/or requires disputes relating to wages, hours, or other working conditions be submitted to individual binding arbitration.

WE WILL NOT enforce a mandatory arbitration program by asserting it in class-action arbitration or litigation regarding wages that the Charging Party Andrea Smith brought against us.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Federal labor law.

WE WILL rescind or revise the EAP to arbitrate in all of its forms to make it clear to employees that the policy does not constitute a waiver of their right in all forums to maintain class or collective actions about wages, hours, and other working conditions.

WE WILL notify all former and current employees who were required to sign or otherwise agree to the EAP in any form at our facilities at any time since December 26, 2012, of the rescinded or revised mandatory arbitration program set forth in our EAP, to include providing them with a copy of any revised agreements, acknowledgement forms, or other related documents, or specific notification that the EAP has been rescinded.

WE WILL reimburse Charging Party Andrea Smith and other grievants for any litigation expenses directly related to opposing Respondent's (Citigroup Technology, Inc. and Citigroup Citicorp Banking Corporation (parent), a subsidiary of Citigroup, Inc.) request/petition to compel individual arbitration before the AAA, in *Darlene Echevarria* et al. *v. Citigroup, Inc.,* et al. (Case No. 01–14–0000–0324).

WE WILL ensure that the Charging Party Andrea Smith, and all similarly situated employees, have a forum to litigate or arbitrate their class complaint by either moving the AAA, jointly with the Charging Party upon request to vacate its decision to not administer the matter as a class action, or permitting her/their claims, upon request, to be arbitrated on a class-wide basis.

CITIGROUP TECHNOLOGY, INC. AND CITIGROUP CITICORP BANKING CORPORATION (Parent), A SUBSIDIARY OF CITIGROUP, INC.
(Employer)

Dated: ____________________ **By:** ____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

South Trust Plaza, 201 East Kennedy Blvd., Suite 530, Tampa, FL 33602-5824
(813) 228-2641, Hours: 8:00 a.m. to 4:30 p.m. (E.T.)

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/12-CA-130742 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (813) 228-2455.